EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

IN RE: C.R. BARD, INC., PELVIC REPAIR SYSTEM PRODUCTS LIABILITY LITIGATION	MDL NO. 2:10-MD-2187
IN RE: AMERICAN MEDICAL SYSTEMS, INC., PELVIC REPAIR SYSTEM PRODUCTS LIABILITY LITIGATION	MDL NO. 2:12-MD-2325
IN RE: BOSTON SCIENTIFIC CORPORATION PELVIC REPAIR SYSTEM PRODUCTS LIABILITY LITIGATION	MDL NO. 2:12-MD-2326
IN RE: ETHICON INC., PELVIC REPAIR SYSTEM PRODUCTS PRODUCTS LIABILITY LITIGATION	MDL NO. 2:12-MD-2327
IN RE: COLOPLAST CORP. PELVIC SUPPORT SYSTEMS PRODUCTS LIABILITY LITIGATION	MDL NO. 2:12-MD-2387

TRANSCRIPT OF MOTIONS HEARING HELD
BEFORE THE HONORABLE MARY E. STANLEY, MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT
IN CHARLESTON, WEST VIRGINIA

AUGUST 2, 2012

APPEARANCES:

For the Plaintiffs:

MR. HENRY G. GARRARD, III, ESQ.
MR. GARY B. BLASINGAME, ESQ.
Blasingame, Burch, Garrard, Ashley, PC
P. O. Box 832
Athens, GA 30603

HARRY F. BELL, JR., ESQ.
The Bell Law Firm, PLLC
P. O. Box 1723
Charleston, WV 25326-1723

For the Defendant:

DEBORAH A. MOELLER, ESQ.
Shook, Hardy & Bacon, LLP
2555 Grand Blvd.
Kansas City, MO 64108-2613

RICHARD B. NORTH, JR., ESQ.
Nelson Mullins Riley & Scarborough
201 17th St., NW, Suite 1700
Atlanta, GA 30363

Court Reporter: Ayme Cochran, RPR, CRR

Proceedings recorded by mechanical stenography;
transcript produced by computer.

PROCEEDINGS had before The Honorable Mary E. Stanley, Magistrate Judge, United States District Court, Southern District of West Virginia, in Charleston, West Virginia, on August 2, 2012, at 1:00 p.m., as follows:

THE COURT: Good afternoon. I didn't expect to be graced with the presence of all of you so quickly after our status conference.

This is in re: C. R. Bard, Inc. Pelvic Repair Systems Products Liability Litigation, MDL-2187, and we have Henry Garrard and Mr. Blasingame and Mr. Bell, all for the plaintiffs, and Mr. North and Ms. Moeller for the defendants, and you have been, I take it, engaged in taking a deposition today, as well as in the past?

MR. NORTH: I believe that got postponed after all because everybody agreed that this was important. It was supposed to be in Huntington.

THE COURT: Okay.

MR. NORTH: But we decided -- I think they decided to postpone it.

THE COURT: All right. First of all, being mindful of the public record, is there any objection to my providing to the clerk to docket the July 31 letter from Nelson Mullins, Mr. North, and the August 2 letter from Mr. Garrard, just basically giving them to the clerk to docket without exhibits? I don't think we need all the exhibits docketed and I would propose that

Bard's letter be docketed as a motion for protective order.

MR. NORTH: That's fine, Your Honor.

THE COURT: Okay. And, Mr. Garrard, your letter will be docketed as plaintiffs' response.

MR. GARRARD: That's fine, Your Honor.

THE COURT: Okay. Well, I have read your letters, I've read all the cases you cite, and I have read the depositions and, if there's something further that you would like to relate, Mr. North, I'll be glad to hear you now, or Ms. Moeller.

MR. NORTH: Okay, Your Honor. It's good to see you again. We did not expect to be here so soon either after last week's conference, but last Thursday afternoon, while we were actually here in Charleston, the first deposition of a treating physician in one of the bellwether cases, the case of Queen, took place and we, both defendants, Ms. Moeller and myself, and our staff at our firms, became very concerned by what transpired at that deposition.

As the Court knows from the record, we've provided you the rough transcript. The plaintiffs had met extensively with this doctor on two separate occasions. I think we misspoke and said four attorneys. It was actually three attorneys and a paralegal from Mr. Garrard's firm and had shown her at least one company document and talked about the contents of many other company documents.

As the Court is aware and, as the authorities indicate, this

issue of ex parte contact with treating physicians is a difficult one that many of the MDL Courts around the country have grappled with. As the plaintiffs' submission itself points out, jurisdictions vary as to their rules. Some jurisdictions permit the plaintiffs to have ex parte contacts, but not the defendants, with a treating physician. Other jurisdictions allow both parties to. For example, Georgia allows a defendant to have ex parte contacts with the attorneys (sic) subject to certain regulations. I believe New Jersey is the same way.

THE COURT: You said ex parte contacts with the attorneys. You mean --

MR. NORTH: I mean, I'm sorry, with treating physicians, thank you, and given that fact, the -- a number of MDL judges in other proceedings have been grappling with, as the cases point out, how do you handle this circumstance. It appears that most MDL Courts are moving towards a system where they recognize that plaintiffs' attorneys may have the ex parte contacts with the treating physicians, but they issue blanket prohibitions about defendants having the contacts, but a couple of Courts, as we have pointed out, have also said that to level the playing field and the potential for prejudice, unfairness and ambush that can result when the plaintiffs can have the ex parte contacts with the treating physician, but the defendants cannot, that there need to be ground rules, and we cited those cases.

The *Ortho Evra Products* case is the leading case on that

and, in that particular circumstance, the Court held that plaintiffs' attorneys could have the ex parte contacts with the treaters, but in return and to avoid any unfairness, they were limited to discussing issues with the treating physicians about their general care and treatment of the plaintiff in that case and the Court issued a prohibition against the plaintiffs' attorneys addressing liability issues, warnings, company documents, things of that nature. The Court in that particular instance even said the violations of that prohibition could be sanctionable if brought to the Court's attention.

There's also the *NuvaRing* case and, as the plaintiffs correctly note, although the *NuvaRing* case adopts the same limitation as the *Ortho Evra Products* case does, the plaintiffs in that particular case agreed to the limitation. However, the judge in that particular MDL independently noted that he deemed that limitation to be fair and appropriate under the circumstances.

We've also cited the Court to a case from a state court in New Jersey in a mass tort proceeding that takes an even more stringent view. In that case, even though New Jersey allows defense counsel to have ex parte contacts in most circumstances with treaters, the Court ruled it just wasn't feasible to do so in a mass tort circumstance and, to ensure that the situation was fair for all parties, the Court in that particular case ruled that neither side could meet with the treaters. Now we're not

asking the Court for something sort of that stringent because I think that was particular to New Jersey's law which otherwise would have allowed the defendants to meet.

Now, admittedly, as we cited in the brief and as the plaintiffs rely on heavily, we have found two other MDL cases on the other end of the spectrum. That's the *Yasmin* case and the *Kugel Patch* case. In both of those instances, the plaintiff -- the Courts refused or declined to impose a limitation on the scope of the plaintiffs' attorneys' contacts with the treater.

However, neither Court really discussed or delved into the fairness issues that we're raising before the Court and that we believe that the *Ortho Evra* case and the *NuvaRing* case rely on, the fairness and even playing field for both parties, and even in those two cases, I would note that the plaintiffs -- or the Court imposed some restrictions on the plaintiffs' attorneys requiring that if they were going to discuss company documents, and if they were going to talk to these doctors about liability issues beyond the scope of their treatment of the plaintiff, then they needed to make certain disclosures to the defendants in advance of the deposition of those treating physicians.

So all four Courts imposed some limitations, or restrictions, or rules about how this process should occur to prohibit the plaintiffs from discussing any of these non-treatment liability issues and to impose disclosure requirements.

The plaintiffs rely heavily on their brief on the notion that they ought to be able to introduce or meet with the doctors first and then prepare them for these lines of questioning based on company documents because of the learned intermediary doctrine. We submit, Your Honor, that that really is sort of a -- with all due respect, a subterfuge. No one is preventing the plaintiffs' attorneys from -- or suggesting they should be prevented from going in and asking a treating physician,"If you had been aware that Avaulta caused X, Y, or Z complication, would it have impacted your treatment or the decisions you made?" That's clearly fair game.

But to ask those questions under the guise, as you can see in the transcript of Dr. Barbee, using company documents, taking -- that they've shown her or discussed with her in ex parte sessions before the deposition, taking snippets out of those company documents and reading those to her and saying, "If you were aware that employee A said in this e-mail," and blah, blah, blah, "would that have changed?"

That's not necessary to get all the information they need about the learned intermediary defense and all that is is, and again, I'd suggest this respectfully, is subterfuge to allow them to tell their version of bad corporate conduct through the guise of what is supposed to be a fact witness talking about the treatment of a plaintiff.

Again, they should be free to ask a doctor if she was aware

of this complication, erosion, or delayed healing, or whatever the complication they're alleging may be, but to try to put that information through her, through a company document that she has no personal knowledge about and has not seen before until they prepped her for these depositions in an ex parte session, we believe transforms that witness far beyond what a treating physician should be doing.

So, for that reason, Your Honor, we would ask that the Court issue a limitation, such as the Court did in the *Ortho Evra* products case, that allows the plaintiffs -- we recognize they have the right to meet ex parte with these witnesses, but allow -- restricts them and -- or suggests that they cannot discuss company documents and issues like that beyond the knowledge of a doctor and outside of the course of her treatment and care for a particular patient.

We believe that the transcript we gave you shows that the plaintiffs' attorneys are -- because they're very skilled attorneys, are aggressively turning the treating physicians, who are ostensibly fact witnesses, with factual testimony, into advocates for their position.

They're discussing the company documents with them. They are asking them to be a mouthpiece for the plaintiffs' story of corporate misconduct. And we believe that this situation creates a vastly uneven playing field, causes severe prejudice to the defendants, and essentially, it results in am ambush every time

we walk into a deposition.

Now we've raised a second issue, Your Honor, that we've disclosed -- I'm sorry.

THE COURT: Let's just -- I'll get to the 26(a)(2) issues --

MR. NORTH: Right.

THE COURT: -- afterwards.

MR. NORTH: Okay.

THE COURT: First, let me hear from the plaintiffs concerning the ex parte communications.

MR. NORTH: Okay. Thank you, Your Honor.

THE COURT: Thank you.

MR. GARRARD: Thank you, Your Honor. The decisions that sit out there don't float in favor of the defendants' position. The most recent decisions in the *Kugel* case and in the *Yaz* case clearly are well-reasoned decisions and what the Court did in those two cases was to say, look, as a plaintiff, essentially you've got the burden of proof to prove your case and we're not going to tell you how to do that. We are going to say that if you show documents that are corporate documents to a physician or treater or whatever, then if one of them says 48 hours ahead of the hearing, and one of them says 72 hours ahead of the hearing, you've got to give the other side a list of those documents.

The other three decisions that they talk about, one of them

the Court went off on Judge Fallon's reasoning that you can't prohibit plaintiffs' lawyers from having conversations with treating physicians. One of them says you can have the conversations with treating physicians, but we need to restrict it to the doctors' records and other things related to the case. I don't know what "other things related to the case" means, and then the New Jersey decision out of State Court says you just can't do anything.

But in analyzing this, Your Honor, part of what hasn't been told to the Court is this. Bard engages in conversations with these doctors in the process of trying to get them to use their products and in the process of sending them to cadaver courses and didactic lectures and they have the doctors there and they give them their spin in terms of what is the evidence, what isn't the evidence; you need to use our product; you need to do this; here's how you do it, et cetera.

The problem that exists for us is we don't know what those conversations have truly been because we weren't there, but they have already had a shot at most of the implanting physicians that will come before this Court. There's some exceptions, but most of the time, those doctors have been to a Bard-sponsored event.

So it's not that there's a real unlevel playing field here. All that we are doing is what we would do if this was an automobile wreck case, if this was a typical malpractice case. We would show to the witness documents that relate to the issues.

Now, one of the documents that I would like to show to the Court, and I want to show it because defense counsel specifically raised an issue in their -- if I may?

THE COURT: Yes.

MR. GARRARD: Okay, specifically raised an issue in their letter to the Court and they said -- let me put my eyes on -- in bullet point number 3, on the first page, they discuss Bard's alleged trepidation about explanting the product if something went wrong long-term.

If you look at this document, which is a Bard document, Your Honor, and you go to the page entitled, "Kit's Weaknesses," it's about the third page in, and you look at what Bard was saying to its salespeople. Now this is not a document given to the doctors. This is given to their salespeople and they describe "Kits Weaknesses" and say, "Lack of substantial long-term outcome and follow-up data prevents majority of gynecological surgeons from adopting," and then underneath that, "trepidation surrounding removal of kit system should something go wrong long-term."

So to the extent counsel for Bard or Sofradim are taking issue with that as an example, this is their document and this is what they tell their salespeople, and then they go on and say, "Complication rates perceived as still too high. Sacrocolpopexy is still viewed as gold standard for vault prolapse," and the Court heard last Thursday some about sacrocolpopexy, and that

being a different approach from the transvaginal approach that they were pushing in this product, these products.

So my point there is, these are not documents that are anything other than the documents that the defendants have put forward and that's just an example of a document that we believe would be fair game to show a physician, "And had you known, for example, Doctor So-and-So, that Bard says there's lack of substantial long-term outcome and follow-up data pertaining to these products, would you have used the product on this lady? Would it have changed your course had you known there was trepidation surrounding removal of the material should something go wrong?"

I think these are things that we should be entitled to ask the doctor about because we are going to have to face, in most of the cases, the learned intermediary defense and I recognize under West Virginia law that probably is not a recognizable defense in this state, but it is in most states, and I can be assured, and I know Mr. North is not going to get up here and say they're not going to try to do that, because they are. They're going to try to take the position that it's the doctors' fault and they're going to question these doctors about that.

Well, if there are things out there that the doctor doesn't know about in terms of the products, and I will give you another example, and I think this document, in fact, may have been referred to in the deposition of Dr. Barbee, and this goes to an

issue of causation and an issue of what's the problem here.

Persistent delayed healing is an issue that Bard found out about, knew about, and in the document I've just handed to the Court, the document says, and I'm quoting Bard, "Simply by its nature, collagen causes a greater inflammatory response than does pure polypropylene."

THE COURT: Do you know the date that this document originated?

MR. GERRARD: Your Honor, I do not, as I stand here. Mr. North may be able to tell me.

MR. NORTH: I do not, Your Honor.

MR. GARRARD: I don't know the date of it, but the document says, "Simply by its nature, collagen causes a greater inflammatory response than does pure polypropylene. We've shown in the histology images of our animal data that this is a normal organized inflammatory response consistent with good healing.

It does, nonetheless, contain a higher count of microphages and other inflammatory cells, which again can potentially lead to the patient's tissues taking a longer period of time to heal over the vaginal incisions. We will discuss the role of the closure suture further contributing to the inflammation in a moment."

And then goes on to say, "By increasing the inflammatory response at the suture line, we believe the collagen element of the involved -- is the primary cause of persistent delayed healing, as this is consistent with persisted delayed healing

seen previously in our Pelvicol and PelviSoft products."

Another matter that we should be able to ask the physician, "Were you told this and did you know this? If you had known these sorts of things, would it have made a difference in your care and treatment?"

And then, if you go to the third page of that document, Your Honor, paragraph number 5, and this is -- this is a very important paragraph. "Finally, tensioning may also play a role in persistent delayed healing. Do not put the graft under any tension. The postoperative scarification process significantly shrinks the tissues around the mesh, increasing the tension on the graft," and I won't read the rest of it, but the whole paragraph is pretty important.

Shouldn't a doctor know that and shouldn't we be entitled to ask the doctor, "Had you known this, would it have made a difference in your course of treatment of this lady?" I've got a number of documents that I could show to the Court, I won't take the time to do that, but my point in showing these is these are not documents we have created. These are not documents that are designed for inflammation. That's a bad word. We were just talking about inflammation -- or designed to fan the flames, but they are documents that are crucial to our ability to defend against their claims that it's the doctor's fault and to defend against the claims that the doctor is a learned intermediary.

There's a Mississippi case that got dismissed on a motion

and it got dismissed on a motion because the defendants were able to examine the doctor and get the doctor to say, "I wouldn't have changed anything, period. I did what I did. I'd do it again tomorrow" in the courtroom. Well, he's the learned intermediary. Plaintiff is out. We've got an obligation to our clients to prepare the case and we've got an obligation to our clients to figure out how to meet these issues.

The Court heard referred to in the session that we had in chambers with Judge Goodwin on Thursday the *Scott* case and, in the *Scott* case, if the Court will recall, there was a $5.5 million verdict, but in that case, there was an assessment of a 60 percent responsibility on manufacturing and 40 percent responsibility on the doctor.

So it's not a pipe dream on our part that -- that the -- these are good defense counsel and they're going to try to blame the doctor. If I were in their shoes, I would try the same thing, so -- but we've got an obligation to meet those issues with our clients and we suggest to the Court that it is totally appropriate for us to interview the doctors and I think Richard is saying that he doesn't object to that and it is also totally appropriate for us in preparation of the doctors to be able to show them certain documents.

Now, should they be entitled to know ahead of time what documents we showed them? I don't know. If the Court were to say, "Henry, you tell them 72 hours ahead what documents you

showed the doctor," I wouldn't go out of here screaming and saying, "Oh, gosh, the judge didn't do me right."

I mean fairness is fine, but fairness from our standpoint of being able to properly prepare the cases for our clients requires that we be able to show to doctors things that the company hadn't shown them when they had the first shot at it. It's not like this is new to the doctors. It's not like Bard hasn't dealt with these doctors.

The Court will find in the bellwether cases, for example, the *Sisson* case, the implanting doctor was a Dr. Rayburn, who was a proctor for Bard, and there are other instances where that's the same thing and Bard has had shots at these doctors. They've talked to these doctors. We've got multiple e-mails where they deal with various of these doctors.

We've got documents, Your Honor, where one of their proctors, a Dr. Wyndham, and I won't bring it out, but I will be glad to show it to the Court, if you like, where one of the proctors, Dr. Wyndham, at Bard's suggestion, looked at a lady who was having problems, who had been operated on by Dr. Sussler, and in the records of that particular lady, Dr. Wyndham, their proctor, Dr. Wyndham says, "I've quit using the product, the Avaulta Plus products, because I've had this persistent delayed healing that I was talking about and because I've had problems with infections and the issue of rectal problems and just the fatty tissue that this product goes through, infections and

fissures there and, in fact, in 40 percent, 40 percent of my patients where I used the product, I've had the problem and I've quit using it."

Shouldn't we be able to ask doctors, "Did you know this and, if you did, and if you had known it, what difference would it have made?"

And so that's our point, that we need to be able to prepare the cases, because we have the burden of proof. The case law does not support limiting us in that regard. The *Yaz* decision and the recent *Kugel* decision and the decisions of Judge Fallon all mitigate in favor of us being able to do what we've done.

And insofar as the tenure of the letter of the defendants was as if we've done something wrong, we haven't done anything wrong. We have not violated any protective order. We have not violated any provision of the Federal Rules. So we come into this court with totally clean hands simply trying to prepare to meet our burden of proof.

MR. NORTH: Your Honor, if I could defer to my lawyer here.

MS. MOELLER: I just want to clarify a few issues, Judge. First of all, to say that the use of the learned intermediary doctrine is somehow to be blaming the doctors is just a misstatement of what the learned intermediary doctrine is. It's simply a mechanism by which the manufacturers fulfill their duty to warn by warning the manufacturer, not by warning directly

to the plaintiff -- to the patient. It doesn't have anything to do with claiming that the doctor did anything wrong.

From the -- from the manufacturer's perspective, you only examine what the manufacturer has told the learned intermediary. You don't care really from a legal perspective what he has passed on because you look at what they've done to fulfill it and what other sources of information that physician had if he knew something independent of what the manufacturer had said. So it's not a blame assessment on that physician.

Similarly, I think it is grossly unfair and premature for Mr. Garrard to tell the physicians that the defendants are going to point the finger at the doctors, as I personally, and I don't know that Richard has either, made that determination for our clients what our strategy will be in each of these individual bellwether cases and that is clearly unfair and going to be prejudicial to those physicians prior to us coming in and trying to get factual information from them in the deposition because we have not made that strategy determination yet and I think it's grossly unfair for him to go to the physicians with some sort of statement that, "You know the defendants are going to point the finger at you." There's no -- that's inherently prejudicial and a bias against the defendants.

I wanted to address briefly the sales rep conversations with the physicians and the fact that Bard has conversations with them and that's clearly not in the litigation setting. It's clearly

not with lawyers. It's prior to there ever having been any thought of litigation and it's not the same type of discussion that they're having with these physicians.

And, from my client's perspective, we didn't market this product in the United States. We have had no conversations with any of these physicians at any time. We have no sales force in the United States at all for these products. So that clearly doesn't pertain to us. We don't have direct access to these doctors for these products.

The use of -- I beg to differ a little bit with Mr. Garrard in the necessity of using these internal company documents to find out the information that they need to know. It is one thing to ask a physician whether or not delayed healing would have an impact on whether or not the physician would use a product. It's something else to take a document taken out of context, the date of which he doesn't even know. It could have been after this woman was implanted with the product.

If you don't know the date of the document, it may or may not have bearing on what the company knew at a relevant time for that specific plaintiff and so all of these factors, I think, show that this is not the kind of conduct that should be taking place in the MDL segment.

Mr. Garrard talked about, in a typical case, he would do this and he would do that. This isn't a typical case. This is a case of -- I think that's a gross understatement probably. These

are cases that are bellwether. They have impact on other cases. They have impact on other manufacturers. They have impact on the plaintiffs, and what they're doing, clearly, they have access to the physicians under -- they can have ex parte contact with them. That's not the squabble, obviously.

It's when they go beyond their care and treatment and try to influence the doctors' positions on things that we have a problem with and that's -- that's really what the crux of it is, is how far are they allowed to go, and the use of documents and talking about defendant strategies and things like that, we think goes over the line, and that's -- that's our position on that.

THE COURT: Thank you. I have read through Dr. Barbee's deposition and I think all agree that there is no provision in the Federal Rules of Civil Procedure, Federal Rules of Evidence, or the local rules, which has anything to say about this and, in fact, from my own trial preparation experience, my experience on the bench, lawyers would be derelict if they did not interview their witnesses before they took their testimony and if they did not show them relevant documents.

I find what the plaintiffs have done, particularly and specifically as set forth in the Barbee deposition, to have been entirely proper. It appears to have been a very professional deposition.

It was interesting. It moved along. I mean there was a huge amount of material covered and I -- I find the cases which

have suggested that it's appropriate to put in limitations to have offered less than substantial reasons in support of them. There's certainly no provision of the rules, as I've already said.

Now I've also been a lawyer sitting down there and had a cross examination from opposing counsel of the witnesses who I've put on the stand and they've went on at great length about how I woodshedded the witnesses, or I did this and I did that, and the government is so unfair, or whatever it was, and there is ample room for cross examination.

So, for example, if this document on persistent delayed healing was, in fact a -- shall we say a scholarly or, at least, it's obviously scientific and technical to some degree, which was several years after the fact, then that is appropriate game for cross examination and I think any doctor would want to know what did Bard know and when did they know it and how did that -- how did that work itself into the timeline of when the doctor implanted the mesh? What was Bard telling me when I was relying on their statements and what did Bard learn later or perhaps before?

So I will deny that motion for a protective order with respect to setting forth limitations on the plaintiffs in their ex parte discussions with plaintiffs' treating physicians.

I hasten to say that from -- from this particular deposition, I felt that it was a very professional job and, from what I've

seen of the attorneys all along, that's what I expect, that you're both outstanding counsel on both sides, and I expect the courtesies to continue, and I'm quite confident they will.

Now let's go on to the expert report issue and my first question is totally irrelevant. I would like to know what one of these kits costs.

MR. GARRARD: Your Honor, it's my understanding that these kits sell for between $1,600.00 and $1,700.00.

THE COURT: All right.

MR. NORTH: I was going to say $1,600.00.

MR. GARRARD: The medical records and, frankly, the documents from the companies indicate between $1,600.00 and $1,700.00.

THE COURT: Thank you. See, you just -- every once in awhile, you think about these things and you all know the answer and I don't.

Now the -- I will -- again, I've read your materials. I've read the cases. If you want to argue more about it, I'll be happy to hear it.

I want to know what the financial arrangement with these treating physicians is.

MR. GARRARD: We have no financial arrangement with these treating physicians other than they always send us a bill. If we spend two hours with them, they send us a bill for time, but we have not retained the treating physicians, Your Honor, as

retained experts.

THE COURT: Doesn't that answer the issue?

MR. NORTH: No, Your Honor. Respectfully, I would suggest that it's not a matter of whether they're retained or not; it's whether they are giving testimony that's not based on their personal knowledge, that's not based in their role of -- as a treating physician; and we submit that this is going far beyond her role as a treating physician in eliciting opinions, and I think that's consistent with the cases that we've cited.

THE COURT: Well, I found that the cases that you cited did not stand for the propositions as you stated them to be. Rule 26(a)(2)(b) says -- has -- and I read this as the condition precedes, that the witness has to be retained or especially employed to provide expert testimony in the case or, of course, if you're an employee of a party whose job it is to give expert testimony.

So that -- so, number one, what I hear is that we do not have a witness who is retained or specially employed to provide expert testimony. Now I completely agree with you that treating physicians are educated, have enormous --

MR. NORTH: Right.

THE COURT: -- expertise and, under the Federal Rules of Evidence, have technical abilities which will inform the jury that lay people don't have, but what -- what I read these cases to say is that the -- in the *Goodman v. Staples* case, they were

talking about a witness who was hired to render expert opinions. So that, in fact, they say, "We hold today that when a treating physician morphed into a witness hired to render expert opinions that go beyond the usual scope of a treating doctor's testimony, the proponent of the testimony must comply with Rule 26(a)(2)."

I guess it's not all that unusual for a treating physician to become -- to later be hired as an expert or to be offered as an expert.

MR. NORTH: Right.

THE COURT: But the question, isn't it, is the doctor testifying about what happened in the past with this patient or is the doctor offering testimony that is overarching and not with respect to a particular patient?

MR. NORTH: Well, and this may be -- we may have a differing view on what being retained is. To me, if you are paying a doctor to meet with you on two separate occasions and you are paying that doctor by the hour to meet with you in preparation for a deposition and you are going over documents, company documents that the doctor has never seen, and you are asking for her to opine with her expertise about the influence of these company documents that she has no personal knowledge of in the course of her treatment, I believe that is the key point of that case, that sort of work-up of someone, and then asking these questions that go beyond her simple treatment of Mrs. Queen, and the course and care of Mrs. Queen morphs -- and I think that's

the key language in that case -- morphs the person from the fact witness/treating physician into an expert.

So it may just be a difference of opinion on what constitutes "retaining". To me, the two meetings that they're paying this witness by the hour to discuss matters beyond her treatment and then soliciting testimony about complications that she has sustained with other products that aren't even involved, there's a lengthy question -- set of questions to her about her experience and her views on Avaulta Plus and the porcine layer.

This is an Avaulta solo case without the porcine layer. They were eliciting all sorts of information from her and opinions from her using her knowledge, background, and experience that have nothing to do with the facts of this case and are far beyond her treatment of this plaintiff and that's why we submit that, consistent with those cases, the conduct of the plaintiffs here have morphed her into an expert witness.

THE COURT: Well, to the extent that she testified about product -- a product that was not implanted in Ms. Queen, then that simply is not admissible; is that correct, in the bellwether case?

MR. NORTH: We would take that position, certainly, at the appropriate time, but I think that's just one indication of them exploring with her a number of issues and getting opinions on a number of issues that aren't based on her own knowledge from the treatment of Mrs. Queen, the factual background of that

treatment. It's her opinions as to medical issues in general impacting this litigation, we would submit.

THE COURT: How can a treating physician testify about the treatment to a particular patient without taking into consideration all the other patients who had similar symptoms? I mean let's -- let's talk an ear infection. I mean if a doctor is treating a little kid with an ear infection, that doctor is bringing to bear the thousands of little kids with infections, including all three of mine, and what antibiotic is going to work? What procedure to put tubes in the ear is going to work? Do the adenoids have to be removed?

However, now if Dr. Barbee were to be presenting testimony concerning her opinion as to the impact of microphages on the ability of an incision to heal correctly and having written up -- and having written -- and having authored these scientific opinions in the abstract, that would be quite a different situation, it seems to me.

MR. NORTH: I certainly agree with Your Honor that every doctor brings their past treatment and experience to the table in talking about their treatment of the patient at issue at that time, but I think that what happened here, I would respectfully submit, far transcends that example in cases.

A discussion of various attributes and her experience with porcine dermis on Avaulta Plus. Absolutely, her opinions on that are not based on her treatment of Ms. Queen; have no relevance,

you're right, and it would be an admissibility issue at a later time, also, but we believe it's an indication that they're going beyond the treatment so that we're ambushed when we get there.

We don't know what these people are going to be talking about if they're foraying into all of these topics beyond their actual care of the plaintiff and we -- you mentioned earlier the need for vigorous cross examination on the first argument and, going back to that, if I could, we would respectfully request, given the Court's ruling, that the Court at least follow the other two cases relied upon by the plaintiff and require 72-hour disclosure of us about the documents they have shown to that doctor. Otherwise, we can't go in there.

I mean we've produced several million pages of documents and we don't know which ones they're going to pull out and show to a doctor until we get there without a disclosure. So we don't have the opportunity to figure out what the date is or do any sort of ample cross examination.

It's the same problem with these doctors coming in and giving opinion testimony about issues beyond their treatment of a specific plaintiff. We're ambushed, I submit, every time because we cannot prepare to cross them.

We don't have a report. We don't have a report. We don't have disclosure of the documents. We're walking in blind.

My partner, Jane Davis, called me right after I landed in Atlanta Thursday night. She had taken the deposition of Dr.

Barbee. She is a -- has got more experience with scientific issues than anyone I know in this profession. She is a former pharmacist before she went to law school and she just was ambushed at Dr. Barbee's deposition because there had been no disclosures, no information, about all these topics.

She was prepared to depose the expert, or the doctor, on the treatment of Ms. Queen and this became a far-ranging deposition and we submit that there needs to be expert reports if they're going to go far afield from the treatment under the cases we cited. We believe she was effectively retained with their prior meetings and we'd also submit that, regardless, there needs to be some prior disclosure before we go into these depositions as to what the documents were.

THE COURT: Who wishes to respond from the plaintiffs? Mr. Garrard?

MR. GERRARD: I want to say something and then Mr. Blasingame would like to comment to the Court, if he may.

The defendants are not surprised by the issues in these cases. They know what the issues are in these cases. To say that they are ambushed, they're not ambushed.

But what I would be willing to do, if the Court wants me to, is if they want to know 72 hours ahead what are the documents we've shown to a witness, I'm willing to do that. We're not trying to disadvantage anybody. We're simply trying to prepare our cases appropriately and, if that's something that the Court

believes we ought to do, I'm certainly willing to do that.

MR. BLASINGAME: Your Honor, may I interrupt Mr. Garrard for just a moment? I don't -- I don't mind the -- I just don't want -- I prepared a lot of these depositions, plaintiffs' depositions, and sometimes we're about 48 hours out before we know all the documents.

THE COURT: So you just wanted to reign him in a little bit?

MR. BLASINGAME: Yes.

MR. GERRARD: I'm just too liberal, Judge.

THE COURT: Next time, he'll put a choke collar on you and just jerk on the leash.

MR. BLASINGAME: I've been practicing law with him a long time, Your Honor.

MR. GARRARD: Another point, though, that I want to make, Your Honor, is this. In terms of a treating physician, he or she brings to the table whatever their experience is across the board, as Your Honor knows.

Dr. Barbee, I believe, and Mr. Blasingame or Mr. North can correct me if I'm incorrect on this, Dr. Barbee, I believe, had used or considered the Avaulta Plus product with the porcine and had determined to go with the Solo product without any porcine because of thoughts about that product. So the doctor brings -- in arriving at a differential -- and that's what they're doing. They're arriving at a differential in terms of what happened to

this patient? Why did it happen? They bring their whole breadth of experience to it.

THE COURT: Well, I'm going to accept Mr. Garrard's offer to give notice to Bard. I'm going to keep it to 24 -- excuse me -- 48 hours.

MR. NORTH: Okay.

THE COURT: And, however, at this point, I am not persuaded that these treating physicians/surgeons are expert witnesses. My guess is, if they were willing and the plaintiffs were willing for you to have an ex parte sit-down with you, Mr. North, or Ms. Moeller, they would charge you by the hour, too, and that wouldn't make them your expert witness. I haven't seen a doctor yet who is going to sit down with anybody without charging them by the hour.

MR. NORTH: My neighbor.

THE COURT: Maybe when you're having cocktails.

MR. NORTH: Right.

THE COURT: But, at this point, under these circumstances, I am not persuaded that these treating physicians are expert witnesses, even though my guess is, because they are performing delicate and technical surgery, that they are highly experienced and do have their own medical opinions and scientific opinions about various products, but that's what -- who they are and so I have a couple of other -- or at least one other matter.

During the reading of this deposition, I saw that counsel

had agreed that objections would be noted simply, "Objection as to form", that that phrase would be used to interpose an objection, and so it was done repeatedly and I understand that attorneys are concerned about preserving their objections at depositions.

It's not clear to me whether in a bellwether case someone like Dr. Barbee would actually appear and testify in person or whether the videotape would be provided. I mean do you all have a sense for that, whether it's going to be live or not?

MR. GERRARD: Your Honor, it's just going to vary. Sometimes you get a doctor to come live, sometimes you can't. And, frankly, a lot of it will depend upon the circumstances of the doctor at the time of trial, and that works for both sides.

THE COURT: Okay.

MR. NORTH: That's my impression. It would rarely happen, though, I would think, that the doctor would come live, which is why the disclosure for us to do appropriate cross examination is so vital.

THE COURT: All right. Well, Tabitha, if you would give them each a copy of this.

COURTROOM DEPUTY CLERK: Yes, ma'am.

THE COURT: I think you all are aware that I presided over the discovery in this case known as *Feldman Production*. During the course of that case, which also involved -- let me just give you a little bit of background before you start reading

the order.

MR. NORTH: I'm sorry.

THE COURT: *Feldman Production* was owned by some Ukrainians. There were all kinds of international issues involved, plus many of the issues that we have here of documents being produced in a foreign language, the need for translation, depositions to be taken of non-English speakers, the need for complying with Hague Convention and other treaties, plus substantial suspicion that the interpreters wouldn't accurately interpret the question, so that not only did we have interpreters, but we had checkers.

And seeing that on the horizon kept me up, awake one night, and so I just told the lawyers in that case, unless somebody is treading on your absolute privileged communication, don't make any objections at all and nothing will be held against you. In other words, you can come in later, a certain amount of time after a deposition is taken, after you have read it in peace and quiet with no interruptions and, if you see that you should have made a particular objection that's material and important, that you can then interpose it, and I say this -- I'm just suggesting that you all think about this technique and discuss it among yourselves, seeing that depositions are full of utterly worthless objections. They're never really litigated. They're never really adjudicated prior to trial. They just -- it's just kind of yammering in the background.

And so I suggest to you, particularly for non-English speakers, that you reach some kind of agreement along the lines that I set forth in this order so as to make the job for interpreters, and the witnesses, and the lawyers easier. So that's all I have to say.

MR. GARRARD: Thank you for doing that, Your Honor. I can tell you, we have had instances, even with foreign witnesses, not in this case, where you go back and you try to edit, and you try to edit out many of the objections that, frankly, should never have been made. So the point of the Court is very well taken and we will try to work together to see if we can do something.

THE COURT: I think -- I think that the amendments to some of the rules, including -- is it 502 or whatever having to do with clawbacks and -- is to take some pressure off lawyers and not raise the issue of waiver which, of course, can just drive people crazy.

MR. BLASINGAME: Your Honor, there have been many times in my career and in taking depositions that I have offered to the other side, "You may reserve every objection known to man." I've never been taken up on that.

THE COURT: That's right, because they want to interrupt your questioning because you're too good, Mr. Blasingame. I understand that.

All right. Well, I will be entering an order in this and

filing your letters, and it's always a pleasure to see you, and let me know if I can be of any assistance.

MR. NORTH: Thank you, Your Honor.

MR. GARRARD: Thank you very much, Your Honor.

MR. BLASINGAME: Thank you, Your Honor.

MR. BELL: Thank you, Your Honor.

MR. GARRARD: Thank you very much.

(Proceedings concluded at 2:00 p.m., August 2, 2012.)

CERTIFICATION:

I, Ayme A. Cochran, Official Court Reporter, certify that the foregoing is a correct transcript from the record of proceedings in the matter of In Re C. R. Bard, Inc., MDL NO. 2:10-MD-02187, In Re American Medical Systems, Inc., 13 MDL No. 2325; In Re Boston Scientific Corp., MDL No. 2326; and In Re Ethicon, Inc., MDL No. 2327, as reported on August 2, 2012.

s/Ayme A. Cochran, RPR, CRR — April 2, 2013

Ayme A. Cochran, RPR, CRR — DATE